BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SUZANNE HENNIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,716
COMMUNITYWORKS, INC.	)	
Respondent	)	
AND	)	
	)	
AMERICAN FAMILY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant and respondent appeal the June 2, 2011, Award of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded a 5 percent whole person functional impairment for her thoracic spine condition, but denied any permanent partial general (work) disability under K.S.A. 44-510e after the ALJ found that claimant had failed to prove that her work-related accident had permanently aggravated her pre-existing low back disabilities.

Claimant appeared by her attorney, Matthew L. Bretz, of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffrey W. Dean, of Kansas City, Missouri.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on November 9, 2011.

ISSUES

1. What is the nature and extent of claimant's impairment and disability? Claimant contends that she suffered permanent disability and is permanently and totally disabled as the result of injuries suffered while working for respondent. Respondent contends that claimant has failed to prove any permanent impairment or disability from the incident on August 8, 2009, or any time while she worked for respondent as a caregiver.

2. Did the ALJ err in excluding approximately 1,250 pages of medical reports and records from this record after Vito J. Carabetta, M.D. had reviewed those same records as part of his court ordered independent medical examination of claimant?

FINDINGS OF FACT

Claimant began working for respondent in February 2008 as a PCA (caregiver) for disabled individuals. On August 8, 2009, claimant was working with a disabled person who needed to be turned every three to five hours. This quadriplegic client weighed about 300 pounds. Claimant testified that her back was bothering her as she performed her duties for this client. Claimant stated that she "kept getting worse and worse and worse".[1] Claimant suffered from long term back problems and initially thought her problems were due to those past problems. However, on the date of the accident the pain in her back increased substantially. Claimant stated that she was incapacitated and couldn't move. She called her husband to come help her finish turning the client. The next day, claimant was unable to get out of bed. Claimant called 911 and was transported to the hospital. Claimant has not worked since that time.

Claimant was initially being treated by her doctor, David Allen, M.D., who never offered a causation opinion regarding claimant's accident and resulting injuries. Claimant acknowledged that she had both an underlying problem and something that she thought occurred while she worked for respondent. Respondent's work made the condition worse, in her opinion. Claimant was experiencing not only pain in her low back from the lifting, but also in her upper back from having to massage the client's feet. Claimant discussed a baseline low back pain that she had experienced for years. But the work for respondent made the pain worse.

Claimant's medical history is significant in that she suffered a severe fall in 1982 which resulted in multiple surgeries to her low back at L4-5. Claimant underwent a lumbar fusion and had a titanium cage implanted in her spine. Claimant also suffered a myocardial infarction with the placement of a stent, and underwent several other surgeries. Claimant has been receiving Social Security disability payments since 1984 and, while living in Florida between 1990 and 2003, used a walker, a wheelchair and a cane to ambulate. Claimant had, at one time, required the placement of a morphine pump, which was discontinued due to ongoing infections.

In 2003, claimant moved to Kansas. Shortly after she was contacted by Social Security regarding a program called "a ticket to work" which would allow claimant to work without forfeiting her social security benefits. Claimant first worked at the Sac-n-Fox Casino as a blackjack dealer. But, she was forced to quit as she could not tolerate the constant standing. Claimant then worked for the Jackson County Resource Center, working with developmentally disabled adults. This job lasted for about 8 months and required no physical labor on claimant's part. However, that job ended in November 2007, when claimant was hospitalized for taking too high a dose of Lyrica which claimant was taking for Fibromyalgia. Claimant testified that when she came to Kansas, she was feeling great and

[1] R.H. Trans., Joint Ex. A (Claimant's Discovery Depo. at 16-17).

doing great. However, the ALJ noted that claimant was taking so much pain medication that she ended up in the hospital.

Claimant's next job was with respondent. While working for respondent claimant earned $25.00 per hour. From the wage information placed into the record, the ALJ determined that claimant was working about 10 hours per week. However, claimant testified she sometimes worked for an entire weekend without a break. The ALJ found claimant's average weekly wage to be $250.35.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., on January 12, 2010. Dr. Murati was provided a portion of claimant's medical reports, numbering approximately 220 pages. A June 2, 2009, CT scan of claimant's lower back displayed moderate arthritis of the lumbar spine with a metallic spacer bar cage at L4-5 with a small herniation at the L3-4 level. Claimant reported that she had undergone multiple surgeries for her low back in the past. However, Dr. Murati was provided no medical records from those surgeries. He also was not provided medical records as to pre-existing thoracic sprain, right sacroiliac joint dysfunction or left meralgia paraesthetica, all of which he testified had been aggravated by her work-related injury.

Dr. Murati provided a supplemental report dated September 22, 2010 in which he rated claimant at 5 percent to the whole person for the sprain to her upper back, a 5 percent whole person impairment for the sacroiliac joint dysfunction and a 1 percent whole person impairment for the meralgia paresthetica, all pursuant to the AMA Guides, 4th ed. Dr. Murati went on to explain that claimant was permanently and totally disabled as the result of her many physical conditions. Claimant was restricted to a four-hour work day and could only occasionally sit, stand and walk. She was restricted from bending, crouching, stooping or crawling. Lifting of up to10 pounds was allowed only occasionally. Claimant was to do no lifting over 10 pounds. She could rarely climb stairs, climb ladders or squat, occasionally drive, lift, carry push or pull up to 5 pounds, frequently up to 2 1/2 pounds, with no constant lifting, carrying pushing or pulling of any objects. Claimant should alternate sitting, standing and walking as needed with rest every hour for 30 minutes.

Dr. Murati was shown a task list prepared by vocational expert, Robert W. Barnett, Ph. D. Of the 19 tasks on the list, claimant was unable to perform any for a 100 percent task loss.

Claimant was referred by the ALJ for an independent medical examination (IME) to board certified physical medicine and rehabilitation specialist Vito J. Carabetta, M.D., on June 16, 2010. Dr. Carabetta was ordered to both diagnose claimant's conditions and render an opinion as to whether claimant's diagnosed conditions were caused or aggravated by claimant's employment with respondent. Counsel were instructed to provide to Dr. Carabetta with an itemization of the relevant medical reports and records. Counsel provided the co-signed letter with the medical attached. Dr. Carabetta estimated that there were about 1,250 pages of medical records on claimant, which he reviewed in preparation for the

examination. It is noted that none of these medical records were offered into the record at Dr. Carabetta's deposition or at any time before claimant's terminal date ran. Instead, they were attached to respondent's submission letter to the ALJ. However, the ALJ refused to admit the medical records in this matter.

The injury history provided by claimant was consistent with the testimony of claimant. She worked with a quadriplegic son of a friend, turning him every 3-5 hours to prevent bed sores. Claimant reported that prior to this incident she was "doing fine".[2] However, the doctor found her history of no ongoing problems for years to be contradicted by the medical records provided. Claimant was "under the workers compensation system for about 18-20 years" after the original 1982 injury.[3] Yet, claimant denied having any permanent restrictions imposed upon her from that accident.

Dr. Carabetta noted that a CT scan of the thoracic spine taken August 10, 2009, showed mild degenerative disc disease in the upper thoracic spine, but was otherwise unremarkable. A CT scan of the lumbar spine from that same date was stable, but showed scarring from her previous surgery at L3-4 and post surgical changes at L4-5. This CT scan was described as being almost identical to a previous study from June 2, 2009. X-rays from July 31, 2008 were taken following a fall from a horse on July 21, 2008. These x-rays apparently showed the metal fixation devices to have been in proper alignment. An MRI scan performed on March 29, 2010 demonstrated postoperative and degenerative changes without stenosis or herniated disc and without any change since a prior study on August 9, 2006. Apparently claimant, contending that her condition had worsened after the August 8, 2009 incident, advised Dr. Carabetta that "the reports are wrong" and that she "knows" her own body.[4] Dr. Carabetta testified that claimant, although thinking that she was doing well, had ongoing issues with her back that dated back about two decades.

Claimant was diagnosed with chronic low back pain. Dr. Carabetta determined that claimant had a soft tissue injury from the August 8, 2009 incident but it had subsided. Claimant was convinced that she had something wrong with her intervertebral discs, even doubting the radiology reports. But, her examination was essentially unrevealing. Dr. Carabetta noted, with concern, claimant's fairly aggressive use of medications in recent years even while attesting to no ongoing problems before this work injury. In response to the question presented by the ALJ, Dr. Carabetta determined that claimant suffered a short-term aggravation of her pre-existing low back condition. However, her diagnostic work-up has not shown any objective changes or ongoing aggravation attributed to the injury at work.

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[2] Carabetta Depo., Ex. 2 at 2 (Dr. Carabetta's IME report dated June 16, 2010).

[3] *Id.*

[4] *Id.*

An MRI of the thoracic spine from 2006 was within normal limits. A recent CT scan of the thoracic spine showed some degenerative changes in the upper thoracic spine. He determined with claimant's age bracket that was normal. When asked about restrictions, Dr. Carabetta noted that claimant should not have been performing this job in the first place. He opined that she should have been and still should be in the light to sedentary activity level with lifting limited to the 25-30 pound range.

PRINCIPLES OF LAW AND ANALYSIS

Respondent belatedly requests the inclusion in this record of approximately 1,250 pages of medical reports which were provided to Dr. Carabetta at the time of his examination of claimant. While Dr. Carabetta testified to some of the information contained in those records, he neither provided the necessary foundation for their admission into this record, nor were the records offered at the time of his deposition. Instead, the records were merely attached to the submission letter of respondent with a request that the ALJ consider those medical records based only on the fact that Dr. Carabetta reviewed those records in preparation for his deposition. No foundation for the admission of those records was provided, nor was one attempted. A testifying physician may consider medical evidence generated by absent physicians, if expressing his or her own opinion, rather than the opinions of the absent physicians.[5] However, these medical records were never marked as an exhibit and were never offered into evidence during the trial of this case. The exclusion of the medical records by the ALJ is affirmed.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[6]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[7]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[8]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

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[5] *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 764 P.2d 462 (1988).

[6] K.S.A. 44-501 and K.S.A. 44-508(g).

[7] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[8] K.S.A. 44-501(a).

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[9]

Claimant contends that she is permanently and totally disabled from any employment as the result of the lifting required of this job. Respondent, on the other hand, contends that claimant suffered only a temporary exacerbation of a multitude of pre-existing conditions and should be limited to medical treatment for those temporary aggravations. Dr. Murati supports claimant's position, but was provided few of the prior medical records from claimant's long history of back problems.

Dr. Carabetta, on the other hand, was provided approximately 1,250 pages of medical records which he reviewed. Claimant contends that Dr. Carabetta did not address her complaints in the thoracic spine. However, Dr. Carabetta reviewed a recent CT scan of claimant's thoracic spine which identified only age-related degeneration. Dr. Carabetta opined that was normal considering claimant's age bracket. Dr. Murati rated claimant at 5 percent to the whole person for a thoracic sprain. While the ALJ awarded claimant the 5 percent to the thoracic spine based upon the opinion of Dr. Murati, the Board finds the medical opinion of Dr. Carabetta to be more persuasive. This claimant has a medical history filled with back problems and significant limitations beginning as early as 1982. Claimant was awarded social security disability beginning in 1984. Her job with respondent was limited to about 10 hours per week.

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[10]

Claimant contends that she is permanently and totally incapable of any substantial and gainful employment. However, it is unnecessary to decide this issue, as it does not appear that her limitations are the result of injuries suffered while working for respondent. This record supports only a finding that claimant suffered a temporary exacerbation of her pre-existing conditions while working for respondent. As such, she is entitled to the medical treatment necessary to cure and relieve her from the effects of the injury.[11] Any award of permanent partial disability for those injuries is reversed.

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[9] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[10] K.S.A. 44-510c(a)(2).

[11] K.S.A. 2009 Supp. 44-510h.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the exclusion of the medical records attached to respondent's submission letter, but reversed with regard to any permanent partial disability. Claimant is awarded the medical treatment necessary to cure and relieve her from the effects of her accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated June 2, 2011, should be, and is hereby, affirmed with regard to the exclusion of the approximately 1,250 pages of medical records attached to respondent's submission letter, but reversed with regard to any award of permanent partial disability compensation. Claimant is limited to the medical treatment necessary to cure and relieve her of the effects of her work-related accident.

IT IS SO ORDERED.

Dated this ____ day of December, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
Jeffrey W. Deane, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge